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tion of the Constitution of the United States, and that the cases of the others were so "blended and commingled" with that case that he would not distinguish them, it would be little consolation to an injured state that at some future time, after the convicts had been at liberty to prey for years on a suffering community, the Supreme Court would say to him, "Sir, you were in the wrong." But in order to be able to appreciate the remark of the judge at its true value, it should be stated that when counsel subsequently called his attention to it, and inquired in what manner a case thus heard at Chambers could be reviewed, he replied he was satisfied the statement was erroneous.

It seems almost unnecessary to remark that the mere fact that the state court was without jurisdiction did not authorize the federal judge to interfere. The federal courts have no jurisdiction to issue the writ of habeas corpus except in the cases provided by law: *Cabrera's Case*, 1 Wash. C. C. 232; *Dorr's Case*, 3 How. 103; *Metzger's Case*, 5 Id. 176; *Kaine, In re*, 14 Id. 103; *Milligan's Case*, 4 Wall. 2; *United States* v. *Rector*, 5 McLean 174; *United States* v. *Jailer of Fayette*, 2 Abb. (U. S.) 265; *Greathouse's Case*, Id. 382; *Parks' Case*, reported *ante*, p. 84; and no law of Congress has provided or could provide for interference except in cases where the federal jurisdiction is in some way involved. We need not enumerate the cases, which are provided for in detail. The federal judge did not claim that this was one, unless the relators were restrained of their liberty for an act done or omitted in pursuance of a law of the United States, or in violation of the Constitution of the United States. Manifestly they were not.

In considering this case one naturally compares it with the case in which Judge DURELL by his order set up a state government. There is one very obvious difference in the cases. The forms of judicial propriety were wholly wanting in the Louisiana case. In other particulars they rightfully may be classed together.

RECENT AMERICAN DECISIONS.

Supreme Court of Ohio.

JOHN G. HOLZWORTH ET AL. *v* KOCH ET AL.

An agreement to forbear suit on a pre-existing debt is a sufficient consideration for a note given therefor; and an agreement so to forbear until the maturity of the note will be presumed, in the absence of proof to the contrary.

Partial failure of consideration is no bar to an action on a promissory note, but

merely entitles the maker to recoupment for damages, or abatement of the plaintiff's demand, to the extent the maker has suffered loss by the failure.

Parol evidence is admissible to show the consideration of a note, and to show that the consideration in whole or in part has failed; but it cannot be received to contradict the terms of the note, or to attach to it conditions.

MOTION for leave to file a petition in error to reverse the judgment of the District Court of Lucas county.

This was an action, brought by Koch, Mayer & Goldsmith against Holzworth, Sebastian, and Doering, upon a promissory note for $368.60, payable six months after its date, made by Holzworth, Sebastian, and Doering to Koch, Mayer & Goldsmith.

The defendants filed a joint answer, setting up as a defence that Holzworth and Sebastian signed the note as sureties for Doering; that Doering was a merchant tailor, and Koch, Mayer & Goldsmith drygoods merchants; that the note in question was given for a balance of account due to them for goods furnished Doering for carrying on his business; that Doering was, at the date of the note, insolvent, and in order to enable him to pay his debts and continue his business, Koch, Mayer & Goldsmith promised, if the defendants would execute said note, to hold the same merely as collateral security, and would furnish Doering goods on credit, to an amount not exceeding $500, and continue such credit so long as Doering should pay on account, and thus keep the credit within the limit of $500, and make "some small payments, from time to time," upon the note. And the defendants allege that this promise of the plaintiffs was the sole consideration of the note; that the promise was fraudulently made, with the intention never to fulfil it, and that the plaintiffs had not kept the same, but, on the contrary, had failed, and refused to furnish the goods or to give the credit so agreed upon.

The plaintiffs replied denying the matter set up in the answer.

On trial of the cause there was testimony tending to prove the promise of the plaintiffs set up in the answer, and that the plaintiffs have not fully complied with the same, but there was no evidence tending to prove the alleged fraud in obtaining the note. The evidence showed that the promise had been partly fulfilled, by furnishing Doering goods, but to an amount less than $500.

The defendants' counsel asked the court to instruct the jury, that if they found that the note in suit was given for an antecedent debt of Doering, upon an agreement between the parties that it

should be held solely as collateral security for the payment by Doering of the antecedent debt for which it was given, and that Doering should continue to make payments thereon as fast as he could, without reference to the time of the maturity of the note, then, as to Holzworth and Sebastian, there was no consideration for the note, and the verdict should be in their favor. They also asked the court to instruct the jury, that if Holzworth and Sebastian were induced to sign the note upon the plaintiffs' promise and agreement, as set forth in the answer, and that the plaintiffs failed to comply therewith, "and thereby Doering was prevented from carrying on his business as fully as he otherwise would have done," then Holzworth and Sebastian are not liable on the note.

This instruction the court refused to give, and instructed the jury that, in order to entitle Holzworth and Sebastian to a verdict, they must either show fraud in obtaining the note, or a *total* failure of consideration; that if the plaintiffs' promise, as set up in the answer, was the *sole* consideration of the note, and the plaintiffs had *wholly* failed to comply with or execute the promise, then the sureties were entitled to a verdict; but that if an agreement of the plaintiffs to forbear suit on the debt for which the note was given, formed a part of the consideration, or if the promise set up in the answer was the sole consideration, and that promise had been partially executed, then under the pleadings as made up, the sureties would not be entitled to a verdict. And the court also told the jury that, in the absence of proof to the contrary, they should presume that such an agreement to forbear did form part of the consideration of the note.

To which instruction, and refusal to instruct, the counsel excepted; and the jury having returned a verdict for the plaintiffs, judgment was entered thereon in their favor. To reverse this judgment Holzworth and Sebastian prosecuted a petition in error in the District Court, where the judgment was affirmed; and they now ask leave to file a petition in error here to reverse the judgment of affirmance.

Scribner & Hurd, and *L. H. Pike*, for the motion:—

As the debt of Doering was antecedent to the giving of the note, there was, as to Holzworth and Sebastian, no consideration for the note, unless there was an agreement, on the part of the creditors, to forbear the collection for some fixed and definite period: 2

Amer. L. C. 209, 254–256; 8 Cush. 85; *Bingham* v. *Campbell*, 17 Ind. 396.

As we understand the law, the sureties may say to the creditors: We were not bound to pay the antecedent debt of Doering to you. We undertook with you that it should be paid by a certain period, in consideration of your promise and agreement that you would keep him supplied with goods; that you would continue him in his business, thereby enabling him to make gains, from which to pay the debt. This consideration, constituting a condition subsequent, which you were bound to perform, was, in its nature, an entirety. In order to hold us liable you were bound to its reasonable, full performance. Your contract has not been kept; the condition is unperformed; therefore we are not liable. Burge on Suretyship 115, sec. 2; 5 B. & C. 269; 1 Stark. 192; *Campbell* v. *Gates*, 17 Ind. 126; DeColyer on Suretyship 30; *Portage County Bank* v. *Lane*, 8 Ohio St. 405.

Kent, Newton & Pugsley, contra:—

A parol contract can not be set up to vary a written one—that is, in this case, the note—by changing its terms of payment.

If a promise was made to furnish Doering more goods, it would amount to no more than a part of the consideration of the note; that is, the whole promise, made by plaintiffs below, was the consideration of the note, so far as the sureties were concerned. This promise was performed by extending time and by furnishing goods.

The opinion of the court was delivered by

WELCH, J.—We see no error in the instructions of the court, or in its refusal to instruct as requested. In the absence of proof to the contrary, the presumption was that the payees of the note agreed to forbear suit on the debt until the note should mature. There is no such proof in the case, nor is it even alleged in the answer that there was no such agreement to forbear. This agreement, as well as the partial performance of the promise to furnish goods, formed a sufficient consideration to support an action on the note. The failure to furnish goods to the full amount agreed upon constituted only a partial failure, which was no bar to the action, and merely entitled the defendants to recoupment for damages, or to an abatement of the plaintiff's claim, to the extent the defendants may have suffered loss by the failure.

But counsel for plaintiffs in error say, in effect, that the promise to furnish goods, and not to enforce payment of the note faster than Doering should be able to pay, was a *condition* attached to the note, and that it is only upon full performance of that condition that payment of the note can be enforced. It is only necessary to say, in answer to this claim of counsel, that although parol evidence is admissible to show the consideration of a note, and to show a total or partial failure of that consideration, it cannot be received for the purpose of contradicting the note, or attaching to it parol conditions. The note contains an absolute and unconditional promise to pay its full amount at the end of six months, and the defendants sought, by parol proof, to change this into a promise to pay on condition the plaintiffs would furnish goods to Doering, and to pay at such time or times as he might be able to pay. This they could not be allowed to do, without violation of one of the first and plainest principles of evidence.

Motion overruled.

That forbearance to sue an overdue debt is a sufficient consideration for a promise, even by a third party, to pay the entire claim, has been undoubted law since the leading case in the Exchequer Chamber of *Reynolds* v. *Prosser*, Hardres 71 (1656); See *Giles* v. *Ackles*, 9 Barr 147; *Robinson* v. *Gould*, 11 Cush. 55. The loss or suspension of the present right to sue, incurred by the promisee, is quite sufficient, even without any benefit to the promisor: *Morton* v. *Burn*, 7 Ad. & E. 19 (1837). And this consideration would undoubtedly support a promise to pay a much larger sum than the original debt; as held in *Smith* v. *Algar*, 1 B. & Ad. 603 (1830), where a promise to pay 107*l.* at the end of seven days' forbearance to levy an execution for 60*l.* was considered valid. So also a promise to forbear to use some special means allowed by law to collect a legal debt, as, not to arrest the debtor, or not to attach his goods, is a good consideration for another's promise to pay the debt, in whole, or in part, although the original suit against the debtor proceeds at law: *Foster* v. *Clark*, 19 Pick. 329 (1837).

Thus far there is little if any controversy. The more difficult question is, whether forbearance to prosecute a *groundless claim* is a good consideration. The elementary writers quite generally assert that it is not. Addison, Chitty, Hilliard, Leake, Metcalf, Parsons, Smith and Story, seem to agree on this point. Let us examine some of the cases upon which the doctrine is supposed to rest: *Hammon* v. *Roll*, March 202 (1643), is often cited on that point. In that case A. and B., being jointly bound on a bond to C., the latter released A., and afterwards B. promised him that in consideration that he would "forbear him the payment of said money due on said bond till such a day, he would pay it." *Held* that B. was not bound "because there was no debt, *for it was totally discharged by the release to A.*" *Herring* v. *Dorrell*, 8 Dowl. P. C. 604 (1840), rests upon similar grounds. A creditor had taken two joint debtors in execution, and then discharged one; which in law operated

as a discharge of the other; but a friend of the latter promised to pay his part of the debt, if the creditor would also discharge him, which he did; but as he had no right to detain him longer, he was held to have parted with no right, and therefore had sustained no damage; and so there was no consideration for the promise.

Edwards v. *Baugh*, 11 M. & W. 641 (1843), is much relied upon by the elementary writers. There, the declaration alleged that "certain disputes and controversies were pending between the plaintiff and the defendant, whether the defendant owed him 173*l.*, and that the defendant, in consideration that the plaintiff would not sue him for said sum, promised to pay the plaintiff 100*l.* in full satisfaction of said claim." This declaration was held bad on demurrer, because it did not allege that the defendant was in fact indebted to the plaintiff, as he claimed. But this was decided largely upon the peculiar phraseology used in the declaration. See *Llewellyn* v. *Llewellyn*, 3 Dowl. & Lownd. P. C. 318 (1845)

In *Lloyd* v. *Lee*, 1 Strange 94 (1718), at *nisi prius*, a married woman had given a note, and after her husband's death, in consideration of forbearance, promised to pay it. *Held*, that the note was originally absolutely void, and not merely voidable; and that "forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit."

Jones v. *Ashburnham*, 4 East 455 (1804). is often cited in support of this rule. There a person indebted to the plaintiff died, and his widow, before *any administration was taken out*, promised to pay it in consideration of the plaintiff's forbearance to sue; but the court held that as there was no person in existence who could be legally sued during the whole time of the forbearance, there was no legal loss to the plaintiff, or suspension of his right of action, and *therefore* there was no consideration for that particular promise. See also *Martin* v. *Black*, 20 Ala. 309 (1852).

One of the most recent and strongest cases on this side of the question is *Palfrey* v. *Portland, Saco & Portsmouth Railroad Co.*, 4 Allen 55 (1862). There a man was instantaneously killed by the negligence of a railroad company. By law his widow had no valid claim against the company, but she preferred one, and the corporation by a written agreement "in consideration of the premises, and of her forbearance to sue them, promised to pay her $50 a month during her life." They paid the annuity for several years, but finally declined, and being sued on their contract demurred to the declaration. The court sustained the demurrer, saying: "It is a very ancient rule of law, that a promise to pay money in consideration of a forbearance to sue, when there is no legal cause of action is without consideration and void: *Toby & Windham's Case*, 2 Leon. 105; *Hammon* v. *Roll*, March 202; Chit. Cont. (7th Amer. Ed.) 35."

These and other similar cases have led even so careful an author as Judge METCALF, to lay down the law that "forbearance is not a good consideration to support a promise, unless there is a good cause of action. It must be a forbearance of what might be legally enforced:" Met. Contracts, p. 175.

But notwithstanding this number of respectable authorities, it may be doubted whether the doctrine is supported by reason and analogy, to the full extent, at least, to which it has been asserted. Doubtless, if a person knew he had no claim; or supposed he had not; his forbearance to sue such a claim would be no consideration, or rather it would operate as a fraud on the adverse party; and therefore his promise to pay in consideration of such forbearance, might be invalid. Such

was the opinion in *Wade* v. *Simeon*, 2 C. B. 548; and of COCKBURN, C. J., in *Callisher* v. *Bischoffsheim*, Law Rep. 5 Q. B. 452. But this is clearly on the ground of fraud. But if the claim is *bonâ fide* preferred, and is a fair matter of controversy, why should not forbearance to sue such a claim for ever, or even for a limited time, be a good consideration for a promise to pay a part of it? Wherein, in principle, does it differ from a compromise, so called, of a doubtful claim? All agree that a compromise or release of a doubtful claim or right, is a good consideration, and that a promisor cannot show in defence that the promisee had no valid claim or right, which he had relinquished. See *O'Kesson* v. *Barclay*, 2 Penna. St. 531; *Longridge* v. *Dorville*, 5 B. & Ald. 117; *Russell* v. *Cook*, 3 Hill 504; *Keefe* v. *Vogle*, 36 Iowa 87; *Blake* v. *Peck*, 11 Verm. 483; and many other cases. Modern cases also declare it is not necessary a suit should be pending in order to render such a compromise binding: *Cook* v. *Wright*, 1 B. & S. 559; *Easton* v. *Easton*, 112 Mass. 438. Nor is it necessary in such cases that the original cause of action be absolutely extinguished: *Nash* v. *Armstrong*, 10 C. B. (N. S.) 259. Wherein then does such a compromise differ from a promise "to forbear?" In both the promisor obtains freedom from the vexations and expenses of litigation. In both he "buys his peace;" in both the promisee loses his right to sue, for a longer or shorter time, as the case may be. Why should not the same rule apply?

The more recent cases so incline. *Callisher* v. *Bischoffsheim*, Law Rep. 5 Q. B. 449 (1870), is a strong illustration. The plaintiff alleged that certain moneys were due him from the Honduras government, and he had threatened to take legal proceedings against them to enforce payment, and that thereupon "in consideration that the plaintiff would forbear taking such proceedings for an agreed time, the defendant (not the original debtor), promised to pay him 600*l*." The plea was that "at the time of making the alleged agreement, no money was due the plaintiff from the Honduras government." To this plea there was a demurrer. This was the only question argued. COCKBURN, C. J., said: "Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bonâ fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority."

This was followed the next year in the Court of Exchequer by the case of *Ockford* v. *Barelli*, 20 Weekly Rep. 116, and 25 Law T. Rep. 504, which does not seem to be reported elsewhere. There a woman married her own uncle, whose first wife, unknown to her, was

still living confined in an insane asylum. At his death several years afterwards, this second wife made a claim to one-third of his estate, to which of course, she had no legal right. The heirs then gave her this agreement: "In consideration of your abstaining from making and forbearing to make any claim against our late father's estate, we hereby undertake to pay you one-third of the net value of his estate up to the time of his death."

In an action on this agreement the only defence was a want of consideration, and that the plaintiff must have known that her marriage with her uncle was wholly void by st. 5 & 6 Will. 4, c. 54, even if she were ignorant of the fact that his first wife was alive, and therefore must be deemed to have known that she had no legal claim to the estate; but the jury found that when the agreement was made to forbear she believed she was widow of the deceased, and entitled to one-third of his estate. The court held the forbearance sufficient consideration, and upheld the contract, CHANNELL, B., saying: "We have considered this case with the care which the full arguments addressed to us deserved. We cannot distinguish it from *Callisher* v. *Bischoffsheim*, the latest authority on the subject, and we feel bound by that decision."

Thus it appears we are warranted in believing that upon the principle of the thing, and upon the more recent authorities, *a forbearance to sue a bonâ fide claim, as well as a compromise of a pending suit, is a good consideration for a promise to pay, although in fact or in law the promisee would not have recovered upon his original claim.*

EDMUND H. BENNETT.

Court of Common Pleas, No. 3, of Philadelphia.

LOWRY ET AL. *v.* PLITT ET AL.

After the proper interment of a body the control over it rests with the next of kin who is living. It cannot be transmitted or transferred.

Where there were several next of kin in the same degree and they differed in their wishes as to the disposition of the remains, a bill by the majority to enjoin the others from interfering with the removal of the remains to another place, was dismissed.

When a body has been properly buried in a vault, with the consent of all concerned; *quaere* whether even the next of kin can remove it against the will of the vault-owner though the latter be a stranger.

THIS was a motion for an injunction heard on bill and answer. The complainants were the three sons of Henrietta Lowry, and the two executors of a deceased son, Lowry Donaldson Lowry; the respondents were Sophia W. Plitt, Elizabeth S. Edwards, and the Laurel Hill Cemetery Company. The bill set forth that Mrs. Henrietta Lowry died January 12th 1866, at a house in Philadelphia, which had been purchased and furnished for her by her son, Lowry Donaldson Lowry, who was then residing at Lima, Peru; that at the time of the decease of Mrs. Lowry neither she nor any of her children had any place of family sepulture, and her